Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 207.

HENRY M. BAKER, PETITIONER,

vs.

HORACE S. CUMMINGS, DEFENDANT.

The proceedings out of which arose the questions presented on this appeal occurred in the following order of event:

1889, December 19.—In the action at law of *Baker vs. Cummings*, the declaration and the particulars of demand were filed.

1890, February 1.—The bill in equity of *Cummings vs. Baker*, to restrain Baker from the prosecution of his action at law, to have the assignment in writing set aside, and for general relief, was filed.

1892, January 29.—The injunction restraining the prosecution of the action at law was dissolved (Record, p. 14).

1892, February 10.—Cummings *files his* plea of set-off and bill of particulars of his counter-claim to Baker's action at law.

1892, August 24.—Baker joins issue on Cummings' plea of set-off.

1898, February 21.—Supreme Court of United States reverses the decree of the lower court in the equity cause, and remands the cause with direction to dismiss the bill because the same was not filed in time.

1898, June 16.—Baker obtains leave and files special replications to Cummings' plea of set-off.

1898, December 13.—Baker joins issue on Cummings' plea.

To Cummings' plea of set-off, with the bill of particulars of his counter-claim, Baker filed his replication on the grounds—

1. That he never promised as alleged in the plea.

2. That "the said supposed causes of action or claims of said defendant in said plea of set-off did not accrue, nor did any of them accrue, to the said defendant at any time within three years next before the filing of said plea," &c.

3. That Cummings had, in consideration of $15,000 paid to him by Baker, assigned to Baker all of his right and interest in and to the inspector fees, and that the items of Cummings' claim in his plea of set-off were all included in such assignment.

4. That the dismissal of the bill in equity, under the mandate of the Supreme Court, directed in its decree in Baker *vs.* Cummings, was a full and complete adjudication of all the matters embraced in the demand made by Cummings in his plea of set-off and a bar to further recovery under that plea.

Upon this replication followed rejoinders, rebutters, surrebutters, &c., all of which issued finally in the questions: Did the statute of limitations bar all of the items in defendant's particulars of counter-claim? Was the assignment obtained by fraud and misrepresentation? And, Was the decision of the Supreme Court of the United States a final adjudication of the matters at issue between the parties?

The issues joined on the plea of limitations and on the fraudulent procurement of the written assignment are held

in abeyance until the final decision of that raised on the plea of *res judicata*.

The only question submitted to and decided by the Court of Appeals was whether the dismissal of the bill in equity was such an adjudication of the case as will support the plea of *res judicata*, and this appeal is free from the decree of that court holding that inasmuch as the bill was not dismissed on its merits, but because the complainant came too late to obtain relief in that forum, that it cannot bar him from obtaining such relief under his plea of set-off in the action at law as he may there show himself entitled to.

The bill in equity was filed for the purpose of having rescinded, canceled, and set aside the written assignment from Cummings to Baker, on the ground that it had been procured by fraud and misrepresentation. It alleges, among other things, as follows:

"And the complainant avers that he was by the wrongful act of the defendant in the premises, and by means of the said untrue, false and misleading representations as to the amount of said fees, induced to execute said paper-writing purporting to be an assignment of the complainant's interest in said inspector cases, and he therefore says that the defendant holds the said assignment against equity and good conscience, and that the same ought to be regarded as null and void and of no effect whatever," &c.

The bill then recites the institution of the action at law by the said Baker against him, and says:

"That the said suit at law is not yet at issue, but that the time for pleading thereto has nearly approached, and that complainant cannot, under the rules of pleading at law, incorporate in his plea the equitable defenses herein set forth and which, in a court of equity, would prevail against the defendant's demand, and especially is the equitable right of the complainant to have discovery in the premises, and to have the said assignment canceled and held for naught, a matter not cognizable in a court of law."

The answer of the defendant Baker to the bill clearly recognizes what the object and purpose of the bill is, viz., to set aside the written assignment. It says (page 44):

"The defendant, further answering, says this is an attempt on behalf of the complainant, after the lapse of more than three years, with the full knowledge of all the facts, to attack said sale as void; the claim here made by complainant is old and stale, and such as is not favored in equity, and especially ought such demands as this to be frowned down by equity after the lapse of this period of time, and during the whole period and over of three years the complainant has not said nor made any effort against the *bona fides* of said transaction, and the complainant here pleads the statute of limitation in his behalf; that said claim did not accrue, nor was any demand made to show error or otherwise by complainant to defendant within three years."

The Supreme Court of the District of Columbia and the Court of Appeals were both of the opinion that under the facts of the case Cummings should not be debarred by the lapse of time from having an inquiry into the *bona fides* of the assignment and from an accounting, it appearing that while the alleged assignment was made on September 6, 1886, that the partnership between the parties continued until September 1, 1889, and the bill in equity was filed by Cummings February 1, 1890—that is, within three years and four months after the date of the assignment.

But the Supreme Court of the United States was of opinion that both the lower courts erred in their judgments, and it reversed the decree of the Court of Appeals and remanded the cause to that court with directions to set aside the decree of the Supreme Court of the District of Columbia and to remand the cause to that court with instructions to dismiss the bill.

Now, two inquiries arise here:

(1.) Was the dismissal of the bill in equity, under the conditions stated, such an adjudication of the case as will

support the plea of *res judicata* to the action at law or to the counter-action under the plea of set-off?

Walden et al. vs. Bodley et al., 14 Peters, 156, was a controversy that had been protracted for more than forty years. Judgments in ejectment were recovered in 1800. In the same year a bill was filed and an injunction was awarded. This bill was dismissed in 1809 for want of jurisdiction. In 1812 another bill was filed, and this was dismissed by the parties in the clerk's office. In 1825 the last bill was filed. The court, in its opinion, said (page 161):

"As the first bill was dismissed for want of jurisdiction and the second by the complainants at rules, in the clerk's office, it is clear that neither can operate as a bar to the present bill. A decree dismissing a bill *generally* may be set up in bar of a second bill having the same object in view, but the court dismissed the first bill on the ground that they had no jurisdiction, *which shows that the case was not heard on its merits*, and this also appears from the dismissal by the party of the second bill, in the clerk's office."

Hughes vs. United States, 4 Wallace, 233, was an information in the nature of a bill in equity filed by the United States against Hughes for the repeal of a patent issued to him in 1841. Hughes plead that he had obtained two judgments in two separate suits. One of the suits had gone in Hughes' favor; the other was dismissed for want of jurisdiction and absence of proper parties, and generally because it was defective, uncertain, and insufficient in the statement of the cause of action. In affirming the judgment below this court, speaking through Justice Field, said:

"In order that judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties, or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any

ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."

Smith vs. McNeal, 109 U. S., 429.

7 *Robinson's Practice*, 185.

The single question decided in *Baker vs. Cummings*, 169 U. S., 189, was that Cummings had waited for more than three years after he had notice of the deceit practiced upon him before he filed his bill to set aside the written assignment, which was the fruit of that deceit, and that this delay in the assertion of his rights constituted laches, which deprived him of the right in that forum to have the relief he asked.

In its opinion (page 196) the court said:

"The controverted issue arising from the foregoing unquestioned facts is this: Cummings claims that he did not derive knowledge of the fraud he complains of from the matters just stated, whilst Baker asserts that if the fraud in the purchase complained of by Cummings had existed, full knowledge thereof was conveyed to Cummings by the facts above stated, and that the silence of the latter and his inaction for years, and until Baker had made claim for money and stated his intention to dissolve the partnership, not only establishes the want of foundation for Cummings' assertion that there was misrepresentation and fraud in the sale, but also makes clear the fact that the right to make such claim was barred, both by limitations and laches, when the demand of Cummings was actually preferred."

And later on the court say (page 169):

"We will defer an examination of the testimony as to the existence of the fraud and misrepresentation complained of until we have passed on the charge that if there was fraud and misrepresentation Cummings had full knowledge thereof immediately after the sale. We adopt this order of consideration, because if it be found that such was the case the question whether the fraud originally existed will become immaterial, in view of the defenses of limitation and laches."

And the court concludes its opinion by saying (pages 208, 209):

"But the principle by which the bar of the statute of limitations is enforced by a court of equity and upon which the doctrine of laches rests is that equitable powers will not be exercised to discover whether one has been wronged when, with full knowledge of the alleged wrong, he has allowed the bar of the statute of limitations to arise, and has slept upon his rights until such a situation has arisen as to render it inequitable to afford him relief."

And—

"Because we rest our conclusions upon the application of the bar of the statute and the laches of Cummings, we must not be considered as intimating that we conclude that there was either clear or convincing proof, or even a preponderance of proof, that the sale was as claimed by Cummings."

So the court of equity refused to entertain the prayer of Cummings that the written instrument of assignment executed by him to Baker be rescinded and set aside because it had been procured by the fraud of Baker. That court would not even consider the case presented by Cummings, because, as it said, he had delayed his coming too long.

Now, let it be borne in mind that Cummings was at that time and has ever since been in a court of law at the suit of Baker, who demanded judgment against him for money. Cummings had presented his defense to that action by setting up a counter-claim against Baker through pleas of set-off, under a local statute. To this plea Baker had replied by setting up the written assignment to himself from Cummings of the very claims which Cummings was now asserting ownership of by his plea. It was then solely in aid of his defense that Cummings had resorted to the court of equity for the rescission and cancellation of this written assignment. The court of equity had, as we have seen, refused to entertain his prayer, and now it is insisted here by Baker that the refusal of the court

of equity to entertain Cummings' prayer for certain purely equitable relief was an adjudication by that court of the very matter which that court had refused to consider at all, and that the decree of the court of equity, dismissing the bill because it was filed too late, is a good bar to the claim asserted by his plea of set-off by Cummings in the legal action. Cummings' claim in the court of equity was to have the written assignment set aside, and then, that court having obtained jurisdiction over the subject-matter and the parties, might proceed further to so adjudicate all the questions that would follow upon the vacation of that assignment as to make a complete decree, fully and finally disposing of the entire case. But the court of equity declined to take the initial step—it refused to entertain the case presented by the bill at all, for any purpose, and so Cummings' bill in equity was dismissed.

Cummings' claim in the court of law is not to have the written assignment set aside, but it is to have certain claims allowed him, an itemized statement of which he files with his plea.

The argument of the petition here is that the court of equity might have passed upon all the questions presented by the bill, and because it might have done so, and did dismiss the bill generally, it must here be presumed to have done so, and thus to have adjudicated the matter on its merits.

But the opinion of the Supreme Court states expressly and very plainly exactly what it did pass upon, and it appears there that it did not consider the question at all that is presented in this action at law under the plea of set-off.

The petitioner, however, insists that we cannot look at the opinion of the court at all—that we are limited and controlled absolutely by the terms of the decree of that court.

Well, so be it. The decree of the Supreme Court, as it appears on page 209, begins as follows: "It follows," &c. Follows what? Something that precedes, as to which the

decree is both *post hoc* and *propter hoc*. Does not this language make the opinion part of the decree? Does the interposition of a period rather than a semicolon separate the two?

Why did the court dismiss the bill of Cummings, instead of merely denying his right to have the written assignment set aside? That bill prayed for a settlement and statement of the partnership accounts between the parties. The partnership was not dissolved until September 1, 1889, and the bill was filed February 1, 1890. There was no question of laches or limitation as to that relief, and there could be no question as to the right of one partner to resort to equity, against his partner, for settlement of their accounts. That is a distinct head of equitable jurisdiction and relief. Why was it denied to this complainant by the dismissal of his bill? For one only possible reason. The court recognized that while the bill set out all the facts which were material for a complete decree between the parties, the only question presented for its consideration was the rescission of the written assignment, and it declined to consider that because presented too late.

Now, that being so, by what course of reasoning can it be maintained that a decree which merely dismissed a bill because it was filed too late to be considered by a court of equity was an adjudication by that court, not merely of the single question which that court refused to consider, but of all other questions raised by the bill and which that court might have decided, had it entertained the bill and considered and decided the preliminary question? How can the refusal of the court to consider the case presented by the bill in equity be an adjudication of the case presented in the action at law on the defendant's plea of set-off? If Cummings, the defendant, is estopped by the decree in the equity suit from prosecuting his counter-claim against Baker, why is Baker not equally estopped by the same decree, and for the same reasons, from the prosecution of his claim against

Cummings in that same action? Surely the equity court could not have ascertained and adjudicated Cummings' rights, upon a settlement of the partnership accounts, without, at the same time and in the same proceeding, having ascertained and adjudicated Baker's rights, which are now being asserted in his action at law. How can it be said that the decree of the court of equity, which applied equally to both parties, operates to bar the defendant from asserting his counter-claim, while it does not so operate as to bar the plaintiff from asserting his claim, when both claim and counter-claim formed parts of the same partnership account?

Laches and the statute of limitations apply only to the remedy, not to the right. One may be barred from a remedy in a court of equity, while not at all impaired as to his remedy for the same cause of action in a court of law.

The bar of the statute of limitations applies, in this District, after three years, while across the river, in the city of Alexandria, it is five years. Suppose the holder of a note in this District finds here the maker or endorser, who are residents of Alexandria, and sues them on the note, which was made and payable in Alexandria. They plead the statute of limitations of the *lex fori*, and are successful. He then sues them in the city of Alexandria. Can they prevail there on a plea of *res judicata* of the judgment here in their favor? They would speedily be told that the period that served in Washington to bar the remedy there would not serve in Alexandria, where five years was the bar.

The discussion of the whole matter in the opinion of the Court of Appeals, delivered by Mr. Justice Shepard, might have been relied on by us as affording an exhaustive argument in support of the conclusion reached by that court. We refer to it now as exhibiting grounds which do not require reinforcement at our hands and upon which we are content to submit the case.

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For Defendant.